



# Excise Tax Advisory

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## **Staffing Companies and Professional Employer Organizations**

This Excise Tax Advisory explains how staffing companies and professional employer organizations determine the business and occupation (B&O) tax classifications that apply to their income. It also explains whether certain gross receipts may be excluded from the measure of B&O tax.

### ***Staffing Companies***

Staffing companies furnish personnel to clients on a part time or temporary basis. Some staffing companies claim that payments received from these clients should be excluded from the measure of the B&O tax as an advance or reimbursement (commonly referred to as a "pass-through" payment) under WAC 458-20-111 (Rule 111).

Washington imposes the B&O tax on the act of engaging in business activities. RCW 82.04.220. The law does not allow a deduction from the measure of the tax for costs of doing business. Some funds received by a taxpayer, however, may not be part of the gross income of the taxpayer's business. Rule 111 recognizes that certain receipts "pass through" a business solely in the business' capacity as an agent for a customer or client. Those payments meeting the requirements of Rule 111 are not attributed to the business activities of the business, and may be excluded from the measure of the B&O tax.

In order to exclude these payments from the measure of tax, the Washington State Supreme Court has ruled that two conditions must be met. The taxpayer must first establish that it received the funds as the agent of the customer or client. If this first condition is satisfied, the taxpayer must also establish that its use of the funds to pay a third party is solely as an agent of the customer or client. *City of Tacoma v. William Rogers Co.*, 149 Wn.2d 169, 60 P.3d 79 (2002).

### ***Is a staffing company an agent of its clients?***

The existence of an agency relationship is not controlled by the labels the parties use to describe themselves in their contract documents. Rather, standard common law agency principles are used in analyzing whether an agency relationship exists. The essential elements of common law agency are mutual consent to the relationship between a principal and an agent, and the right of control over the agent by the principal. If these elements are not satisfied, there is no agency relationship.

***Is a staffing company liable for paying workers other than as agent of its clients?***

If a staffing company assumes any liability to third parties in connection with the receipt of payment, including any liability to the workers, beyond that of an agent of the client, the payments it receives and uses to pay the third parties are not excludable "pass-through" payments. These payments must be included in the measure of tax, notwithstanding that the staffing company or its client may designate these payments for paying workers' wages and benefits. For example, the Washington State Supreme Court held that when a staffing company is the employer of temporary workers, the staffing company is liable for paying the workers as a principal, not solely as an agent. *City of Tacoma v. William Rogers Co.*, 149 Wn.2d 169, 60 P.3d 79 (2002).

***What is the appropriate tax classification?***

If a staffing company is the client's agent and has no liability for paying the workers furnished to the client other than as agent, the staffing company's income is subject to the service and other activities B&O tax. The measure of tax does not include funds qualifying for "pass-through" treatment under Rule 111.

When a staffing company is liable to pay the workers other than as agent of customer, the staffing company's B&O tax reporting classification is determined based on the services performed by the staffing company's employees. The measure of tax includes payments that the staffing company or client may designate for paying the employees' wages or benefits. If the work performed is classified as a retailing activity under RCW 82.04.050, the staffing company must collect retail sales tax from its client, unless specifically exempt by law. If an employee performs services subject to one tax classification and, incidental to those services, performs a service subject to a different tax classification, the tax classification of the predominate services performed applies to the gross income associated with that employee.

**Examples:**

- Income for providing employees that perform engineering services to a manufacturing firm is subject to service and other activities B&O tax.
- Income for providing employees that perform architectural services to a construction company is subject to service and other activities B&O tax.
- Income for providing employees to operate cash registers for a retail clothing store is subject to service and other activities B&O tax.
- Income for providing employees to a homeowner who perform landscape services for the homeowner is subject to the retailing B&O tax. Retail sales tax must also be collected from the homeowner and remitted to the Department.
- Income for providing employees that perform construction cleanup services to a construction company is subject to the wholesaling B&O tax, but only if the staffing company obtains a resale certificate from the construction company. If a resale certificate is not obtained, retailing B&O and retail sales taxes apply.
- Income for providing employees to a television broadcasting company who clean the interior of an office building and sweep adjacent pedestrian entryways and sidewalks is subject to the

service and other activities B&O tax because these activities are janitorial services. The service and other activities B&O tax applies to the gross income attributable to these employees even if in addition to the janitorial services the employees incidentally pick up litter from an adjacent parking lot.

- Income for providing employees to a television broadcasting company who perform janitorial services (subject to service and other activities B&O tax) and will also on occasion pressure wash the exterior of the building (subject to retailing B&O and retail sales taxes) must be segregated for tax reporting purposes. The pressure washing of a building is not a service incidental to the janitorial services.
- Income for providing an employee to a homeowner whose primary job is to clean the house (subject to service and other activities B&O tax) and who will also prepare one meal per day (subject to retailing B&O and retail sales taxes) is subject to the service and other activities B&O tax, if no segregated charge is made for the preparation of the meal. The employee's predominant activity is to clean the house.
- Income for providing an employee to a client who customizes a software program for the client is subject to the service and other activities B&O tax. The service and other activities B&O tax applies to the gross income attributable to the employee even if at the client's request the employee incidentally installs a different software program onto the client's computer.
- Income for providing an employee to an insurance agency who is licensed as an insurance agent and performs services under the authority of that license is subject to the insurance agents B&O tax.
- Income for providing an employee to an insurance agency who is a receptionist is subject to the service and other activities B&O tax.

### ***Professional Employer Organizations***

A professional employer organization (PEO) is an organization that leases its employees to its clients. Its relationship with its employees is long-term rather than temporary. It enables clients to outsource management of human resources, employee benefits, payroll, and workers' compensation.

#### ***Is a professional employer organization an agent of its clients?***

Standard common law agency principles applicable to staffing companies are similarly applicable to PEOs. Thus, the principles discussed above on whether a staffing company is an agent of its clients applies equally to PEOs.

#### ***Is a professional employer organization liable for paying workers other than as agent of its client?***

The earlier discussion on this topic for staffing companies applies similarly to PEOs. If a PEO assumes any liability to third parties in connection with the receipt of payment, including any liability to the workers, beyond that of an agent of the client, the payments it receives and uses to pay the third parties are not excludable "pass-through" payments. These payments must be included in the measure of tax,

notwithstanding that the PEO or its client may designate these payments for paying workers' wages and benefits.

***What is the appropriate tax classification?***

The earlier discussion on how a staffing company determines the applicable B&O tax classifications applies similarly to PEOs.

If a PEO is the client's agent and has no liability for paying the workers furnished to the client other than as agent, the PEO's income is subject to the service and other activities B&O tax. The measure of tax does not include funds qualifying for "pass-through" treatment under Rule 111.

When a PEO is liable to pay the workers other than as agent of customer, the PEO's B&O tax reporting classification is determined based on the services performed by the PEO's employees. The measure of tax includes payments that the PEO or client may designate for paying the employees' wages or benefits. If the work performed is classified as a retailing activity under RCW 82.04.050, the PEO must collect retail sales tax from its client, unless specifically exempt by law. If an employee performs services subject to one tax classification and, incidental to those services, performs a service subject to a different tax classification, the tax classification of the predominate services performed applies to the gross income associated with that employee. Refer to the examples for staffing companies above as examples that similarly apply to PEOs.

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